

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 18 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EVA MOORE; BROOKE SHAW,

No. 20-35028

Plaintiffs-Appellants,

D.C. No. 2:16-cv-01123-TSZ

v.

MEMORANDUM*

MITZI JOHANKNECHT, in her official
capacity as King County Sheriff,

Defendant-Appellee,

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted December 9, 2020
Seattle, Washington

Before: BERZON, MILLER, and BRESS, Circuit Judges.

Plaintiffs Moore and Shaw appeal the district court's dismissal of their claims under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. We reverse and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Moore and Shaw have standing under the law of the case and the law of the circuit. A panel of this circuit has already held, in a published opinion, that plaintiffs have standing to sue. *See Moore v. Urquhart (Moore I)*, 899 F.3d 1094, 1099 (9th Cir. 2018). Under the law of the case doctrine, we “generally refuse to reconsider an issue that has already been decided by the same court . . . in the same case.” *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (citing *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc)). And published panel opinions bind us absent irreconcilable intervening Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc). In *Moore I*, the panel considered the same facts before us now, including that the writ of eviction was stayed and that Moore and Shaw had reached a settlement with their landlord. *See* 899 F.3d at 1098, 1100. The district court was bound by the *Moore I* panel’s holding that plaintiffs have standing, as are we.

2. The amendments to the Residential Landlord-Tenant Act (RLTA) have not mooted this controversy. The key provision at issue in this case, Wash. Rev. Code § 59.18.375 (§ 375), was not amended. Defendants are therefore not entitled to a presumption of mootness. *See Cuvillo v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993)). Moore and Shaw allege that the notice provided by § 375 is constitutionally deficient. As the text of the notice

provided to tenants pursuant to § 375 remains unaltered, this claim is not moot.

Moore and Shaw further allege that the nonpayment eviction procedures set out in the RLTA violate due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Whether changes to statutory provisions other than § 375 cure any constitutional defects in the RLTA scheme is a question that goes to the merits, not mootness.

We therefore hold that plaintiffs Moore and Shaw have standing and that the controversy is not moot.

3. We do not reach the merits of the due process issues raised in this case. The district court alternatively denied summary judgment to the plaintiffs on the merits of their claims. But denials of summary judgment are generally not appealable. *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010). Our case law is inconsistent as to whether appellate courts lack jurisdiction to consider denials of summary judgment after a jurisdictional dismissal when, as here, the decision on appeal resulted in entry of a final judgment in the district court, or, instead, have discretion in such circumstances to decline to address the denial of summary judgment on the merits. *Compare Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 694 n. 2 (9th Cir. 1992), *with Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 & n.3 (9th Cir. 1979). We need not resolve this inconsistency here. Even if we have discretionary jurisdiction to review the merits, we decline to do so.

The decision of the district court is therefore **REVERSED** and the case is **REMANDED** for further proceedings.